Filed 5/8/07

CERTIFIED FOR PARTIAL PUBLICATION *

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HAROLD BAXTER, Plaintiff and Respondent, v. GAIL PETERSON, Defendant and Appellant.	B188676 (Los Angeles County Super. Ct. No. BC316470)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest Williams, Judge. Affirmed in part, reversed in part.

Wong & Mak, Fred Wong; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Defendant and Appellant.

Ivie, McNeill & Wyatt, Robert H. McNeill, Jr. and John C. Fauvre for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of Background and Discussion, parts A, B, C, and E.

INTRODUCTION

Defendant and appellant Gail Peterson appeals from a judgment in favor of plaintiff and respondent Harold Baxter. Baxter claimed that he and Peterson entered into an oral agreement, pursuant to which Baxter would lease a house from Peterson for two years and renovate the house at his own expense. In return, Baxter would have the option to buy the house from Peterson at the end of the lease period. Baxter performed, but Peterson refused to sell Baxter the house when he attempted to exercise the option.

Baxter sued for fraud, alleging that Peterson made the promise with no intent to perform it. Peterson denied the allegations and asserted that Baxter's claim was barred by the statute of limitations because Baxter was on inquiry notice of her alleged wrongdoing more than three years (the period of limitations) prior to his filing the action. The jury returned a general verdict, finding Peterson liable for fraud and awarding Baxter compensatory damages of $250,000. After additional deliberation, the jury also awarded Baxter punitive damages of $75,000.

The jury's general verdict necessarily implied a finding that Baxter's claim was not barred by the statute of limitations. In the unpublished portion of this opinion, we conclude that substantial evidence supports this finding. We also hold, however, that the trial court erroneously instructed the jury on both liability and damages issues, and that those errors were prejudicial. Specifically, with respect to the fraud claim, the trial court erroneously instructed the jury that without the consideration of other evidence, a promisor's failure to perform warrants the inference that the promisor did not intend to perform when the promise was made. This instruction is contrary to the law established in *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18 (*Tenzer*). The trial court also erroneously instructed the jury that Baxter was entitled to a benefit-of-the-bargain measure of damages in connection with his fraud claim, contrary to Civil Code section 3343.

In the published portion of this opinion, we conclude that the reversal on the liability issue does not require a retrial of Peterson's statute of limitations defense. The erroneous instruction with regard to liability had no effect on that defense, and neither the

trial court nor the parties should bear the burden and expense of a retrial on a distinct issue properly decided by the jury. We further conclude that Baxter failed to introduce sufficient evidence of Peterson's financial condition to sustain an award of punitive damages. Because we reverse the punitive damage award on grounds of insufficient evidence, that issue cannot be retried. We therefore affirm in part, reverse in part, and remand the matter to the trial court for retrial on the issues of liability and compensatory damages.

[The following Background and Discussion, parts A, B and C are not certified for publication]

BACKGROUND[1]

Peterson's father owned a house located at 2024 Victoria Avenue in Los Angeles (the house). The house was abandoned for close to a decade, during which time it suffered substantial damage from vagrants and animals. Peterson's father began to renovate the house in 1996, working with Peterson's fiancé, Anthony Renkoski, a carpenter. When Peterson's father died in early 1997, substantial work on the house remained to be done. Peterson's father died without a will; eventually, the house passed to Peterson.

Baxter, also a carpenter, was a close friend of Renkoski. In mid-1997, Renkoski solicited Baxter as a potential purchaser or lessee of the house, and prevailed upon Baxter to look at the house. Baxter, who already owned a home in Compton, initially thought the house uninhabitable, and knew that completing the renovation would take a great deal of work. Baxter, however, also recognized that the house had potential and "a lot of character." Built in the 1920s, the house had two fireplaces and was relatively large at 3,500 to 4,000 square feet, not including the three-car garage.

---

[1] To the extent the trial evidence is in conflict, we view it in the light most favorable to the jury's verdict. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.)

Peterson, a lawyer with the Los Angeles City Attorney's Office, owns and leases several other single and multi-family residential properties. She typically obtains written leases from her tenants in those properties. With Baxter, however, Peterson entered an oral agreement that Baxter would rent the house for two years at the reduced rate of $1,000 per month, during which time Baxter would finish renovating the property at his own expense. At the end of the two years, Baxter had an option to buy the house at its fair market value, and a right of first refusal in the event Peterson received an offer from a third party. Peterson agreed to finance Baxter's purchase if he exercised the option; if he did not, Peterson would pay Baxter for his labor and materials. Baxter intended to sell his house in Compton to finance the downpayment.

Baxter moved into the house in June or July 1997, and over the next two years, made substantial renovations to the house, providing labor and materials valued in excess of $69,000 and incurring out-of-pocket costs of $18,000 to $23,000. In 1999, approximately two years after moving in, Baxter sold his house in Compton to obtain funds for the downpayment and attempted to exercise his option to purchase the house. Peterson told him that she was "not ready to deal with that right now." Baxter thought there were probate restrictions relating to her father's estate that prevented her from transferring the house, but believed that she would sell the house at a later time, once those issues were resolved. Baxter spoke to Renkoski about the issue; Renkoski assured Baxter that everything would "be okay." When Peterson was asked when she became owner of the house, she testified, "I'm not exactly certain. I think it was in 2003, but I don't know."

In February 2003, Baxter received a notice from Peterson that she was raising his rent to $1,250 per month. Baxter was "shocked" by the notice; he concluded then that Peterson did not intend to sell him the house. Baxter consulted a lawyer, who wrote to Peterson demanding that she sell the house to Baxter on the terms specified in their oral agreement. After receiving the demand letter, Peterson called Baxter and told him that his claim to the house was unenforceable. Peterson subsequently brought an unlawful detainer action and evicted Baxter from the house.

Baxter sued Peterson on June 2, 2004. He filed his Seconded Amended Complaint on September 14, 2004, stating six claims for relief. The trial court sustained without leave to amend Peterson's demurrers to four of those six claims for relief. Baxter's lawsuit proceeded to trial on two claims: for fraud and quantum meruit. On October 31, 2005, the jury found for Baxter on both causes of action, and awarded Baxter $250,000 in compensatory damages. The jury's vote on the fraud claim was 9-to-3. The trial court thereafter struck Baxter's quantum meruit claim, stating that it "does not apply." After additional instructions and deliberation, the jury awarded Baxter $75,000 in punitive damages.

The trial court entered judgment on the jury's verdict on November 16, 2005. On November 30, 2005, Peterson moved for judgment notwithstanding the verdict or, in the alternative, a new trial. The trial court denied both motions on December 23, 2005. Peterson filed a notice of appeal from the November 16 judgment on January 13, 2006. On January 20, 2006, the trial court entered an amended judgment, awarding Baxter an additional $7,940 in costs.[2]

DISCUSSION

A. Standard of Review

"[A] general verdict implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense." (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673.) We review such findings under the deferential "substantial evidence" standard. "'Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that . . . the power of an

---

[2] The entry of an amended judgment that merely adds costs but makes no material change in the original judgment does not affect our jurisdiction to hear the appeal. (*Amwest Surety Ins. Co. v. Patriot Homes, Inc.* (2005) 135 Cal.App.4th 82, 84, fn.1.) Rather, we treat the notice of appeal as premature and construe it to appeal from the amended judgment. (*Ibid.*; see Cal. Rules of Court, rule 8.104(e)(2).)

appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . . [Citation.]'" (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, abrogated on another ground as stated in *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 100.)

We review de novo the validity of the trial court's jury instructions. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 831.) We will reverse on the basis of instructional error only if the error caused a miscarriage of justice. (Cal. Const., art. VI, § 13; *Fields v. Yusuf* (2006) 144 Cal.App.4th 1381, 1388.) "When deciding whether an instructional error was prejudicial, 'we must examine the evidence, the arguments, and other factors to determine whether it is *reasonably probable* that instructions allowing application of an erroneous theory *actually* misled the jury.' [Citation.] A 'reasonable probability' in this context 'does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' [Citation.]" (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 576.)

B. Substantial Evidence Supports the Jury's Verdict on the Statute of Limitations

As Peterson concedes, the general verdict in Baxter's favor implies that the jury found against Peterson on her statute of limitations defense. Peterson nevertheless argues that, as a matter of law, Baxter had constructive notice of Peterson's alleged fraud no later than 1999, when Baxter attempted to exercise his option to buy the house and Peterson told him that she was "not ready to deal with that right now." Peterson asserts that, because Baxter did not file this action until June 2, 2004, Baxter's claim is barred by

the three-year statute of limitations for fraud. (Code Civ. Proc., § 338, subd. (d).)[3] We disagree.

Section 338, subdivision (d) provides that the limitations period on a fraud claim begins to run upon "the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Under the discovery rule, "the statute of limitations begins to run when the plaintiff suspects or should suspect that [his] injury was caused by wrongdoing, that someone has done something wrong to [him] . . . . A plaintiff need not be aware of the specific 'facts' necessary to establish [his] claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, [the plaintiff] must decide whether to file suit or sit on [his] rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; [the plaintiff] cannot wait for the facts to find [him]." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111.) Resolution of the statute of limitations issue is normally a question of fact. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487.)

Substantial evidence supports the jury's conclusion that the limitations period did not begin to run prior to June 2, 2001. Peterson did not overtly refuse to sell Baxter the house until 2003. Baxter testified that he trusted Peterson because she is an attorney and was his friend; he was also a close and long-time friend of Peterson's fiancé. The three of them were close enough that they traveled on vacation together as recently as 2002. There is no evidence that either Peterson or Renkoski did or said anything inconsistent with Baxter's professed belief that Peterson would honor the option when she had the ability to do so.

Peterson argues that Baxter's testimony that he was "shocked and a little upset" when Peterson refused to honor the option in 1999 establishes as a matter of law that

---

[3] Code of Civil Procedure section 338, subdivision (d) provides, "[Within three years:] An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Baxter was on inquiry notice of Peterson's fraud. We disagree. A reasonable person can be disappointed and "a little upset" without being on inquiry notice that he has been tortiously wronged. All Peterson said was that she was "not ready to deal with that *right now*" (italics added). That does not necessarily suggest that she was reneging on any promise. Indeed, at about this time, Renkoski assured Baxter that everything would "be okay."

In addition, the jury had sufficient evidence to conclude that Baxter was reasonable in his belief that, in 1999, Peterson had "some probate issues restricting her from being able to do anything with the property at that time." Baxter's belief is consistent with Peterson's testimony. Peterson testified that her father died without a will. When asked when she took title to the house, she testified: "I'm not exactly certain. I think it was in 2003, but I don't know." Peterson further testified that, at the time she rented the house to Baxter, she "didn't know what was going to happen with that piece of property. I didn't know if I'd have to sell it or the estate. I told him I didn't know what was going to happen with the house, and that I knew it needed work done, and that I was reducing the rent for that very reason. And I told him I wouldn't know what would happen with that house for at least a year." Peterson did not raise Baxter's rent until February of 2003. Taken together and interpreted most favorably to the jury's verdict, the evidence supports the inference that, although she was "not *exactly* certain" (italics added), Peterson took title to the house in or around early 2003. The jury thus had substantial evidence to support its conclusion that Baxter reasonably believed that Peterson would honor the option when the probate of her father's estate resolved, even though she was "not ready to deal with" the issue in 1999.

Peterson also argues that Baxter demonstrated that he was suspicious of Peterson when he threatened Renkoski in 1999 that he would "resolve this matter in court." The record, however, does not support that contention. Although Baxter initially described that conversation with Renkoski in the context of testimony about his 1999 conversation with Peterson, Baxter later made clear that his conversation with Renkoski occurred in 2003, not 1999. This is consistent with Renkoski's testimony that he did not discuss with

Baxter the attempt to exercise the option in 1999 until "a couple of years later." It was the jury's task to resolve any ambiguities or inconsistencies in the testimony. The jury's finding on the statute of limitations issue is thus supported by substantial evidence.

C. The Trial Court Prejudicially Erred in Instructing the Jury on Liability

Baxter requested, and the trial court gave, the following special jury instruction: "Without the consideration of other evidence, the subsequent failure to perform a promise warrants the inference that the promisor did not intend to perform when [she] promised" (brackets in original). Peterson had objected to this instruction. Peterson argues that this instruction is contrary to California law, and that there is a reasonable probability that the instruction affected the jury's verdict. We agree with both contentions.

In *Tenzer*, *supra*, 39 Cal.3d 18, the California Supreme Court addressed the issue of whether a cause of action for promissory fraud could be maintained even though the "promise" was unenforceable as a contract under the statute of frauds. (*Id.* at pp. 28-29.) The court held that fraud actions could be predicated upon such promises. (*Id.* at pp. 30-31.) In doing so, the court rejected the argument that permitting such fraud actions would, in effect, nullify the statute of frauds because "the disappointed promisee" could simply "recast[ ] his complaint to include an allegation of misrepresentation." (*Id.* at p. 30.) This was not a concern, the court reasoned, because the "plaintiff in an action on a fraudulent promise must produce evidence of the promisor's intent to mislead him." (*Ibid.*)

The court observed, "Some California cases have stated broadly that '[t]he subsequent failure to perform as promised warrants the inference that defendant did not intend to perform when she made the promise. [Citations.]' [Citations.] This may suggest that proof that a promise was made and that it was not fulfilled is sufficient to prove fraud. This is not, and has never been, a correct statement of the law, and we disapprove the cases cited to the extent they suggest otherwise. [¶] Rather, 'something more than nonperformance is required to prove the defendant's intent not to perform his promise.' [Citations.] To be sure, fraudulent intent must often be established by circumstantial evidence. Prosser, for example, cites cases in which fraudulent intent has

been inferred from such circumstances as defendant's insolvency, his hasty repudiation of the promise, his failure even to attempt performance, or his continued assurances after it was clear he would not perform. [Citation.] However, if plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury. The policies of the statute of frauds will not be subverted by affording plaintiffs who can prove actual fraud the opportunity to do so." (*Tenzer, supra,* 39 Cal.3d at pp. 30-31.)

Tenzer, supra, 39 Cal.3d 18, thus holds that the mere failure to perform is not sufficient to prove that the defendant in a promissory fraud case did not intend to perform at the time the promise was made. This remains the law in California. (See generally, 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 782, pp. 1132-1134; 1 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 1:137, pp. 490-499 (rel. 10/03) (Miller & Starr).) The four cases cited by Baxter in the trial court as authority for his special jury instruction,[4] although not specifically mentioned by the Supreme Court in *Tenzer*, all pre-date *Tenzer* by between 17 and 51 years, and have been identified by commentators as among the cases disapproved by *Tenzer* on this issue. (1 Miller & Starr, *supra,* § 1:137, p. 497, fn. 32.) Baxter's special jury instruction was thus an incorrect statement of the law, and the trial court erred in so instructing the jury.

Baxter attempts to salvage the instruction by arguing that "failure to perform the promise . . . does logically support an inference of fraud." We do not disagree. Failure to perform can, when coupled with other circumstantial evidence, *support* an inference of fraudulent intent. The instruction in question, however, states that failure to perform *"warrants"* such an inference, *"without the consideration of other evidence"* (italics added). As defined by Webster's Third New International Dictionary, the verb "to warrant" means, among other things, "[t]o serve as or give sufficient ground or reason

---

[4] *Wilson v. Rigali & Veselich* (1934) 138 Cal.App. 760; *Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272; *Wilkenson v. Linnecke* (1967) 251 Cal.App.2d 291; *Rambo v. Blain* (1968) 263 Cal.App.2d 158.

for." (Webster's 3d New Internat. Dict. (2002) p. 2578.) The instruction thus communicated to the jury that Peterson's failure to sell Baxter the house provided adequate grounds, without the consideration of other evidence, for the jury to infer Peterson's fraudulent intent. As explained above, that instruction was contrary to California law.

Based on our review of the whole record, we conclude that the error was prejudicial. The jury's verdict was a close one. It voted 9-to-3 in favor of Baxter on the fraud claim, the minimum number required to render a verdict in a civil action under the California Constitution. (Cal. Const., art. I, § 16.) Baxter's attorney specifically argued the erroneous instruction to the jury, stating, "Also, there's an inference under the law that if the party doesn't perform, there's an inference that the person did not intend to perform at the very onset," and, "she didn't perform because she never intended to perform." Peterson's lawyer, who defended the case on the theory that Peterson never promised to sell Baxter the house, did not make an alternative argument on fraudulent intent that might have alleviated or mitigated prejudice from the erroneous instruction.

The other circumstantial "evidence" cited by Baxter in his argument to the jury to support an inference that Peterson harbored fraudulent intent at the time she made the promise was not necessarily evidence of intent. Baxter argued that (1) in her *trial testimony*, Peterson denied making the promise; (2) in her *trial testimony*, Peterson denied "any contact" with Baxter in 1999, when Baxter attempted to exercise the option; and (3) in her *trial testimony*, Peterson denied that Baxter was her friend; she characterized Baxter as a mere "acquaintance." All of that testimony is consistent with Peterson's contention that she did not promise to sell Baxter the house. The rejection of Peterson's trial contention does not mean Peterson harbored fraudulent intent in 1997.

The only pretrial conduct of Peterson that Baxter argued to the jury to support the fraudulent intent element was that Peterson "shined [Baxter] on when he came to her" to exercise the option in 1999. This argument does little more, however, than rephrase the proposition that Peterson's failure to perform warrants an inference of fraudulent intent. Further, Baxter adduced no evidence that Peterson had the *ability to perform* in 1999. As

described above, the evidence is consistent with the conclusion that Peterson did not take title to the house until much later—early 2003, and Baxter testified that he believed in 1999 that probate restrictions prevented Peterson from transferring title. Peterson's failure to perform in 1999 therefore does not reasonably support an inference that Peterson harbored fraudulent intent in 1997.

The record also lacks the other types of circumstantial evidence of fraudulent intent noted by the Supreme Court in *Tenzer*, *supra*, 39 Cal.3d at pages 30-31. Peterson did not repudiate the promise "shortly after it was made." (*Id.* at p. 30.) To the contrary, Baxter relied heavily on evidence that Renkoski and, to a lesser extent, Peterson, both affirmed the promise to mutual friends and neighbors to support his argument that Peterson made the promise. Baxter did not introduce evidence that Peterson made "continued assurances after it was clear [she] would not perform." (*Ibid.*) As Baxter argued to the jury, it was Renkoski, not Peterson, who told Baxter that everything would "be okay." There is no evidence that Renkoski did so at Peterson's behest, nor did Baxter allege, argue or prove that Renkoski and Peterson conspired to defraud him.

We therefore conclude that there is a reasonable probability that the trial court's erroneous instruction misled the jury, and that Peterson might have obtained a more favorable result had the jury been properly instructed. Because the trial court struck Baxter's quantum meruit claim on the basis that the jury had rendered a verdict in Baxter's favor on fraud, the trial court is instructed to reinstate Baxter's quantum meruit claim on remand.

[The following part D is certified for publication]

D. Our Reversal and Remand on the Issue of Liability Does Not Require Reversal of the Decision on the Statute of Limitations Defense

We have concluded that there is substantial evidence that Baxter did not have sufficient notice of Peterson's alleged fraud at a time that would result in his claim being barred by the statute of limitations. We have also held that in connection with the fraud claim, the instruction providing that without consideration of other evidence, the failure

to perform a promise can warrant an inference of a lack of intent to perform the promise when made, constituted prejudicial error requiring reversal as to liability.

Our reversal and remand on the issue of liability does not require a retrial of Peterson's statute of limitations defense, even though the jury returned only a general verdict, and thus did not render a special verdict on the limitations issue. A general verdict implies a finding in favor of the prevailing party of every fact essential to support that verdict. (*Henderson v. Harnischfeger Corp., supra*, 12 Cal.3d at p. 673; 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 351, p. 399.) "It is a firmly established principle of law that '[t]he appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial.'" (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776.) Accordingly, "an appellate court in reversing a case for an error at the trial, upon finding that one issue . . . is not tainted by any error, may order a limited new trial." (*Baxter v. Phillips* (1970) 4 Cal.App.3d 610, 616-617; see *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1053-1054 [affirming verdict on liability and punitive damage issues but reversing for retrial of limited issue of compensatory damages]; *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1478 ["There is no constitutional impediment to a retrial of a limited issue, so long as that issue is sufficiently distinct and severable from the others that a limited retrial would not result in an injustice"]; see also 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 779, pp. 806-807 ["Where the appeal is from the whole judgment, the reversal may permit the trial court's determination of certain issues to stand but direct the retrial of a particular issue or issues"].)

Defenses based on the statute of limitations are frequently bifurcated and tried separately from a plaintiff's liability case. (Code Civ. Proc., § 597 [special defenses to be tried separately upon court's own motion or motion of any party]; see generally, 1 Schwing, Cal. Affirmative Defenses (2007 ed.) Statute of Limitations, § 25:79, pp. 1612-1614 (Schwing).) This procedure is "intended to avoid the waste of time and money caused by an unnecessary trial of issues that are moot by reason of the bar of the statute

of limitations." (Schwing, *supra,* at p. 1613, fns. omitted.) Neither the parties nor the trial court should bear the burden and expense of retrying a distinct issue that a properly instructed jury has already decided.

Peterson's limitations defense was sufficiently distinct so that affirming the jury's verdict on this limited issue will not deprive Peterson of a fair retrial on the liability issue. Although some of the evidence introduced at trial was relevant to both the limitations and liability issues, removing the limitations issue from the case will not prevent Peterson from introducing that same evidence in a retrial on liability. Peterson had a full and fair opportunity to litigate the statute of limitations issue; the jury necessarily found against her in rendering its general verdict for Baxter. "To not honor the jury's verdict on th[e limitations defense] would mean [Baxter] would lose an advantage fairly won." (*Valentine v. Baxter Healthcare Corp., supra,* 68 Cal.App.4th at p. 1479.) Accordingly, we affirm the jury's verdict on the statute of limitations defense. That issue is not to be retried on remand of this matter to the trial court.

[The following part E is not certified for publication]

E. On Remand, the Jury Instructions on the Measure of Damages Must Be Consistent with Civil Code Section 3343

Because we remand the case for retrial on liability, we address for the trial court's guidance Peterson's contention that Baxter is not entitled to damages measured on a benefit-of-the-bargain basis. (See § 43 ["if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case"].)

"There are two measures of damages for fraud: out-of-pocket and benefit-of-the-bargain. The out-of-pocket measure restores a plaintiff to the financial position he enjoyed prior to the fraudulent transaction, awarding the difference in actual value between what the plaintiff gave and what he received. The benefit-of-the-bargain measure places a defrauded plaintiff in the position he would have enjoyed had the false representation been true, awarding him the difference in value between what he actually

received and what he was fraudulently led to believe he would receive." (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 236.) Civil Code section 3343, subdivision (a) provides in part, "One defrauded in the purchase . . . of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction . . . ." Such "additional damage" consists of "[a]mounts actually and reasonably expended in reliance upon the fraud" and "[a]n amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud." (Civ. Code, § 3343, subd. (a)(1)-(2).)

Civil Code section 3343 thus specifies that out-of-pocket loss is the exclusive measure of damages in cases in which a plaintiff is defrauded in the purchase of property, unless the fraud is perpetrated by a fiduciary. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240-1241; *Fragale v. Faulkner*, *supra*, 110 Cal.App.4th at p. 236; see generally, 12 Miller & Starr, *supra,* § 34:85, pp. 303-308.) This limitation applies even if the defrauded purchaser, as in this case, never obtained title to the property. (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 53-54; see *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1175-1176 ["Fraudulent promises to sell (as in *Kenly v. Ukegawa*, supra, 16 Cal.App.4th at p. 55) . . . may cause the attempted buyer to expend money in reliance, but they do not themselves cause the losses occasioned by the attempted buyer's failure to actually obtain the property"].) Baxter is therefore entitled to recover on his fraud claim damages measured by his out-of-pocket loss, not his lost benefit-of-the-bargain.

Baxter argues that he is permitted to recover benefit-of-the-bargain damages under Civil Code section 3343, subdivision (a)(4).[5] Subdivision (a)(4) provides that a

---

[5] Baxter also references Civil Code section 3343, subdivision (a)(3) which permits a party "induced by reason of the fraud *to sell or otherwise part* with the property in question" to recover "profits or other gains which might reasonably have been earned by use of the property had he retained it" (italics added). Baxter does not explain how

defrauded purchaser may recover "an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, . . . only if and only to the extent that all of the following apply: [¶] (i) The defrauded party *acquired the property for the purpose of using or reselling it for a profit*" (italics added). Although subpart (a)(4) thus permits recovery of *lost profits* by a defrauded purchaser in limited circumstances, it does not permit recovery of damages on a benefit-of-the-bargain basis. (*Stout v. Turney* (1978) 22 Cal.3d 718, 726-728 & fn. 12 ["[A] loss-of-profits standard is not the same as a 'benefit-of-the-bargain' standard. The former applies only where there are reasonably anticipated 'profits or other gains.' (Civ. Code, § 3343, subds. (a)(3) and (a)(4)). Such is not normally the case, for instance, when property is purchased for residential purposes"].)

There is no evidence in the record (and the jury did not find) that Baxter sought to acquire the house "for the purpose of using or reselling it for a profit." (Civ. Code, § 3343, subd. (a)(4).) To the contrary, Baxter specifically alleged in his Second Amended Complaint that, had Peterson honored the option, Baxter "would have a *home* that he had reconstructed" (italics added). Accordingly, subdivision (a)(4) does not apply to Baxter's claim. Furthermore, even if we assume that subdivision (a)(4) might apply, that provision does not permit recovery of lost profits when, as here, the defrauded purchaser did not obtain title to the property. (*Kenly v. Ukegawa, supra,* 16 Cal.App.4th at pp. 53-54; see generally, 12 Miller & Starr, *supra,* § 34:90, p. 326 ["if the buyer who has been induced by fraud to contract to purchase property does not acquire title to the property, the proper measure of damages is measured by the out-of-pocket losses suffered

---

subdivision (a)(3) applies to this case; obviously, Baxter never sold or otherwise parted with the house. The parties have not briefed whether subdivision (a)(3) might permit recovery of lost appreciation relating to Baxter's sale of his home in Compton, and we express no opinion in that regard. (Cf. *Strebel v. Brenlar Investments, Inc.* (2006) 135 Cal.App.4th 740, 746-748 [lost appreciation from sale of prior home recoverable in fraud action against *fiduciary* real estate broker].)

by the buyer as a result of the seller's fraud, and not the benefit of the bargain type remedy represented by the buyer's lost profits"].)

Baxter also argues that, because the fraudulent promise was an *option* to purchase the property rather than a promise to *sell* the property, section 3343 does not apply and the appropriate measure of damages is "the expected profit from the land, the difference between the option price and the market value." The cases cited by Baxter, however, have no relevance to the proper measure of tort damages in this case.[6] The fraud that Baxter alleged in his Second Amended Complaint is that Peterson "never intended to honor THE OPTION." The option was a promise by Peterson to sell the property upon the occurrence of a condition, namely, Baxter's exercise of the option. Peterson failed "to honor" the option by refusing to sell Baxter the house. Baxter does not argue that the option had value independent of the house, nor would the record support any such argument. Analytically, Baxter's fraud claim is no different than a fraud claim premised on a seller's refusal "to honor" a purchase agreement for real property upon tender of the purchase price by the buyer. The gravamen of Baxter's claim is that he was "defrauded in the purchase . . . of property." (Civ. Code, § 3343, subd. (a).)

Finally, Baxter argues that he was entitled to benefit-of-the-bargain damages because he and Peterson were engaged in a "joint venture," and she was thus his fiduciary. Baxter, however, did not plead any such joint venture, did not argue the existence of any such joint venture to the jury, did not request a jury instruction relating to any such joint venture, and the jury made no finding of any such joint venture (or any other fiduciary relationship). Accordingly, on remand, the trial court should instruct the jury that Baxter, if he prevails on the liability issue, is entitled to damages measured by

---

6 *County of San Diego v. Miller* (1975) 13 Cal.3d 684, 691-693, is an eminent domain case, in which the California Supreme Court held that the holder of an unexercised option to purchase real property is entitled to due process compensation measured by "the excess—if any—of the total [condemnation] award above the optioned purchase price." *Erich v. Granoff* (1980) 109 Cal.App.3d 920, 927-928, is a breach of contract case.

his out-of-pocket loss, consistent with the provisions of Civil Code section 3343, subdivision (a).

[The following part F and Disposition are certified for publication]

F. The Punitive Damages Award Is Not Supported by Substantial Evidence and May Not Be Retried

Peterson argues that Baxter failed to introduce sufficient evidence of Peterson's financial condition to support the jury's award of punitive damages. We agree.

Civil Code section 3294, subdivision (a) permits an award of punitive damages "for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." We review the trial court's award of punitive damages for substantial evidence. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916.) "An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 & fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980] (*Neal*); *Adams v. Murakami* (1991) 54 Cal.3d 105, 110 [284 Cal.Rptr. 318, 813 P.2d 1348] (*Adams*).)" (*Kelly v. Haag, supra*, 145 Cal.App.4th at p. 914.) Only the third factor is at issue in this case.

"[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth . . . exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 & fn. 13.) A punitive damage award "can be so disproportionate to the defendant's ability to pay that the award is excessive for that reason alone." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 111, italics omitted; see also *Simon v. San Paolo U.S. Holding Co., Inc., supra,* 35 Cal.4th at p. 1185.) Accordingly, "an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial

condition." (*Adams, supra,* 54 Cal.3d at p. 109.) "Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive." (*Id.* at p. 112.) Plaintiff bears the burden of proof. (*Id.* at p. 119.)

The court in *Adams, supra,* 54 Cal.3d at p. 116, fn. 7, declined "to prescribe any rigid standard for measuring a defendant's ability to pay." Net worth is the most common measure, but not the exclusive measure. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 621, 624-625 [evidence that defendant was "a wealthy man, with prospects to gain more wealth in the future"]; see *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582-583 ["Net worth is too easily subject to manipulation to be the sole standard for measuring a defendant's ability to pay"].) In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." (*Kenly v. Ukegawa, supra,* 16 Cal.App.4th at p.57, italics omitted; *Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1152; *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1064-1065.) "What is required is evidence of the defendant's ability to pay the damage award." (*Robert L. Cloud & Associates, Inc. v. Mikesell, supra,* 69 Cal.App.4th at p. 1152.) Thus, there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.

Baxter failed to present meaningful evidence of Peterson's liabilities, or other evidence, that would indicate her ability to pay a punitive damage award. The relevant evidence shows the following:

- Peterson is employed as a prosecutor by the Los Angeles City Attorney's Office. There is no evidence, however, regarding her salary or other compensation, or her personal indebtedness.
- Peterson owns the house in question, which she estimated at the time of trial to be worth $700,000 to $750,000, and which generates monthly rental income of $1,000. There is no evidence regarding whether or to what

extent the house is mortgaged or otherwise encumbered, or to what extent, if any, the rental income generates net profit.

- Peterson owns another house, near the house in question, which she estimated to be worth $800,000. Again, there is no evidence regarding whether or to what extent this house is mortgaged or otherwise encumbered.
- Peterson owns and "operates" (i.e., rents) two single family residences and one multi-family residence, and owns but does not "operate" five single family homes and one multi-family residence. (The record is unclear whether these include the two houses referred to above.) Other than the two properties referred to above, there is no evidence regarding the value of these properties, the amount of income they generate, the extent to which they are mortgaged or otherwise encumbered, or whether Peterson "operates" her rental houses at a profit.

In sum, although the record shows that Peterson owns substantial assets, it is silent with respect to her liabilities. The record is thus insufficient for a reviewing court to evaluate Peterson's ability to pay $75,000 in punitive damages. (See *Kelly v. Haag, supra,* 145 Cal.App.4th at p. 917 [reversing punitive damage award when "there was no evidence of any encumbrances on the [defendants'] properties at the time of trial, or of other liabilities [defendant] may have had"].) We therefore reverse the punitive damages award.

Baxter had "a full and fair opportunity to present his case for punitive damages, and he does not contend otherwise." (*Kelly v. Haag, supra,* 145 Cal.App.4th at p. 919.) When a punitive damage award is reversed based on the insufficiency of the evidence, no retrial of the issue is required. (*Id.* at pp. 919-920.) Accordingly, on remand, the issue of punitive damages shall not be retried.

DISPOSITION

The verdict on the statute of limitations issue is affirmed. The verdicts on liability and punitive damages are reversed. The trial court is instructed on remand to reinstate Baxter's quantum meruit claim, and to limit any retrial to the issues of liability and compensatory damages, measured in a manner consistent with Civil Code section 3343. No costs are awarded.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.